Supreme Court U.S.
FILED
AUG 12 1996
CLERK

(2)

No. 96-112

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF MARYLAND,

Petitioner,

vs.

BRUCE LAMONT DENNIS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN E. HARRIS
Public Defender of Maryland

GEORGE E. BURNS, JR.*
Assistant Public Defender

Office of the Public Defender
Maryland Bar Center
520 W. Fayette Street
Baltimore, Maryland 21201
(410) 333-4767

Counsel for Respondent

* *Counsel of Record*

QUESTION PRESENTED

Did the Court of Appeals correctly hold that the evidence was insufficient to sustain the convictions for disorderly conduct and battery?

INDEX

TABLE OF CONTENTS

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT OF CERTIORARI 2

The Court of Appeals Correctly Held That the Evidence was Insufficient to Sustain Convictions for Disorderly Conduct and Battery.

TABLE OF AUTHORITIES

Cases

Clark v. Jeter, 486 U.S. 456 (1988) 4

Dunaway v. New York, 439 U.S. 979 (1979) 5

Estelle v. McGuire, 502 U.S. 62 (1991) 4

Jackson v. Virginia, 443 U.S. 307 (1979) 5

Maryland v. Wilson, 106 Md.App. 24, 664 A.2d 1
cert.denied, 340 Md. 502, 667 A.2d 342 (1995)
cert.granted sub nom, 64 U.S.L.W. 3829 (1996) 5

Patterson v. New York, 432 U.S. 197 (1977) 5

Preiser v. Newkirk, 422 U.S. 395 (1975) 4

Whren v. United States, 116 S.Ct. 1769 (1996) 5

No. 96-112

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF MARYLAND,

Petitioner,

vs.

BRUCE LAMONT DENNIS,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Bruce Lamont Dennis, by counsel, Stephen E. Harris, Public Defender of Maryland, and George E. Burns, Jr., Assistant Public Defender, Office of the Public Defender, respectfully request that the Court deny the Petition for Writ of Certiorari filed by the State of Maryland as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

Respondent was convicted of disorderly conduct and battery. He was sentenced to concurrent terms of imprisonment of forty-five days.

Officer Wayne Foskey of the Princess Anne Police Department testified that on November 27, 1993, he was in a patrol car with another officer (Reid) when he saw a

vehicle drive through a stop light. Foskey pursued the vehicle, but the driver of the vehicle ignored Foskey's emergency lights and increased his speed. Foskey shined a flashlight into the car and told the driver to pull over. This command was ignored. During the pursuit, another police car, driven by Trooper Bettina Collins joined the pursuit. Eventually, the vehicle was driven into a driveway and stopped.

Respondent was the passenger and opened the passenger's door of the stopped vehicle. Foskey "yelled at him to shut the car door and stay in the vehicle."

> A. He continued to open the door and stepped out of the vehicle. I again hollered for him to get back in the vehicle and shut the door. He totally ignored me. He shut the door of the vehicle and started walking away, at which time I yelled for him to stop. He still totally ignored me, continued moving away, and at this time, I took him to the ground.
>
> Q. And then what happened?
>
> A. At that time, Mr. Dennis struck me in the ribs with his elbow and began fighting and I ended up spraying him with pepper mace. It took a tussle with him to get him to the car. When I got him to the car, I had to spray him with pepper mace again to get him in the car.

According to Trooper Collins,

> Mr. Dennis and the operator of the vehicle ignored our commands at the time. There were several subjects in the yard at the time who were also yelling at us and saying things to Dennis and the other subject.

REASONS FOR DENYING CERTIORARI

The question posed by Petitioner, "[w]hen a police officer has lawfully stopped a motor vehicle, does the Fourth Amendment permit the officer to order passengers to remain in the vehicle during the course of the encounter?" asks for nothing more than

an advisory opinion. The simplest means of testing whether the question posed presents a case or controversy is to answer the question as the Petitioner desires and test the result.

As to the disorderly conduct, the Court of Appeals held:

> In addressing the disorderly conduct conviction, the State contends that the refusal of the petitioner to stay in the vehicle once it was stopped, coupled with the refusal to comply with Officer Foskey's subsequent commands, constituted disorderly conduct. The State argues, in that regard, that "*Drews* and *Harris* instruct that a conviction for disorderly conduct will lie whenever a person disobeys a lawful police command to stay -- or go -- when such a command is designed to avoid a breach of the peace." That argument proves unavailing in the instant case because the testimony lacks the evidentiary foundation on which to base the petitioner's conviction. As noted earlier, Trooper Collins testified that the persons gathered in the yard where the driver's vehicle was stopped were yelling at the police and saying things to the driver and the petitioner. We find it highly significant, however, that the State has proffered no evidence as to the genesis of the yelling, what was being said, even whether the persons were reacting in favor of the petitioner or the police.
>
> In sum, the circumstances described by the State in no way lend themselves to the notion that the petitioner's conduct created any real danger of a breach of the peace. As we see it, the quantum of evidence necessary to sustain a disorderly conduct conviction under Article 27, Section 123, is much greater than the State offered, or suggests in this case. *Petition*, Appendix at 7a.

Even assuming the officer had the right to order Respondent to stay in the vehicle, Respondent would still not be guilty of disorderly conduct because there was no evidence that Respondent's "conduct created any real danger of a breach of the peace."

As to the battery, Foskey testified that only after Respondent exited the vehicle, shut the door, started to walk away, and ignored an order to stop, did Foskey assault Respondent. Trooper Collins stated that "both subjects did exit against our commands, so we asked them just to get down." Thus, Foskey acted because Respondent walked away -- whether Respondent was entitled to get out of the car is irrelevant. Indeed, Foskey could not have acted in any other way. If Respondent had stopped rather than walked away, there would have been no basis for Foskey's attack unless the Court were to hold that the passenger could not leave the vehicle, and if he does, the police may punish him by throwing him to the ground.

In sum, answering the question posed by the Petitioner in the affirmative would not change the result in this case. "The exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy" and, therefore, federal courts lack the power to render advisory opinions. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

Even if the Petitioner had correctly formulated the question, *i.e.* the question asked of and answered by the Court of Appeals -- was the evidence sufficient? -- the Petitioner would be in no better position because there would be no federal issue. This Court has repeatedly said that federal courts do not sit to decide questions of state law. Federal courts do not "reexamine State court determinations on State law questions." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Similarly, this Court said in *Clark v. Jeter*, 486 U.S. 456, 460 (1988), the "question of how to interpret the Pennsylvania statute ultimately is a matter of State law."

While the United States constitution requires that a conviction must rest on evidence sufficient to establish proof beyond a reasonable doubt, *see Jackson v. Virginia*, 443 U.S. 307 (1979), the question of whether evidence is sufficient is ordinarily a state law question. The Court of Appeals concluded that the evidence failed to establish that Respondent's conduct -- right or wrong -- created a real danger of a breach of the peace as required by the Maryland disorderly conduct statute.

In the context of the battery, it is clear that Foskey, in tackling Respondent, was arresting him. *See Dunaway v. New York*, 439 U.S. 979 (1979) (objective standard to determine if police conduct constituted an arrest). The Court of Appeals also noted that there was nothing to suggest that the tackling and macing were part of a "stop." Under Maryland law, Respondent was entitled to resist the unlawful arrest. Moreover, the extent and existence of affirmative defenses are normally questions of state law. *See Patterson v. New York*, 432 U.S. 197 (1977).

The Petitioner has failed to raise any question which justifies review by this Court. Petitioner implicitly recognizes this and does not request that this Court hear this case. Instead, the Petitioner attempts to obscure the lack of merit in its position by requesting the Court to dispose of the case in light of *Maryland v. Wilson*, 106 Md.App. 24, 664 A.2d 1, *cert.denied*, 340 Md. 502, 667 A.2d 342 (1995), *cert.granted sub nom*, 64 U.S.L.W. 3829 (1996), and *Whren v. United States*, 116 S.Ct. 1769 (1996). In *Whren*, this Court concluded traffic stops must be only objectively reasonable. It was never disputed in this case that the traffic stop was proper. Thus, *Whren* has no bearing on the instant case. *Wilson* is limited to the question of whether the police may order a

passenger out of a car during a lawful traffic stop. Nothing in *Wilson* remotely involves the sufficiency of the evidence of convictions pertaining to a passenger who is attacked by the police while walking away in plain view without any basis for believing that he has violated, he is violating, or he will violate the law.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition by denied forthwith.

Respectfully submitted,

Stephen E. Harris
Public Defender of Maryland

George E. Burns, Jr.
Assistant Public Defender

Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,	*	
Petitioner	*	
vs.	*	No. 96-112
BRUCE LAMONT DENNIS,	*	
Respondent	*	

* * * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **9th** day of **August**, **1996**, three copies of Respondent's Brief in Opposition and Motion for Leave to Proceed in Forma Pauperis were mailed to Gary E. Bair, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 200 St. Paul Street, Baltimore, Maryland 21202, counsel for Petitioner.

George E. Burns, Jr.
Assistant Public Defender
Maryland Bar Center
520 W. Fayette Street
Baltimore, Maryland 21201
(410) 333-4767

Counsel for Respondent